January 2006

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part IV—Habitual Offender Provisions

8.16 Sentencing an Offender for a Subsequent "Major Controlled Substance Offense"

A. Mandatory Sentence Enhancement—MCL 333.7413(1) and (3)

Replace the paragraph beginning near the bottom of page 105 and continuing on the top of page 106 with the following text:

As written, the general habitual offender statutes do not require a sentencing court to follow the Public Health Code's sentencing scheme unless the offender's subsequent conviction is for a "major controlled substance offense." However, as discussed in subsection (B), below, it appears that a sentencing court may sentence an offender convicted of a subsequent "major controlled substance offense" under either of the two sentencing schemes, without regard to the directive found in the general habitual offender statutes for subsequent "major controlled substance offenses."

Part IV—Habitual Offender Provisions

8.16 Sentencing an Offender for a Subsequent "Major Controlled Substance Offense"

B. Application of the General Habitual Offender Statutes to Cases Involving Controlled Substance Offenses

Insert the following case summary immediately before subsection (C) near the top of page 107:

According to the Michigan Supreme Court, sentence enhancement under either the habitual offender sentencing scheme or the Public Health Code's subsequent offender sentencing scheme is proper where a defendant with prior felony convictions is subsequently convicted of a "major controlled substance offense." *People v Wyrick (Wyrick II)*, ___ Mich ___ (2005).

In *Wyrick*, the defendant was convicted of two drug-related offenses, one of which was a "major controlled substance offense." Specifically, the defendant was convicted of possession of marijuana–second offense, a misdemeanor, and the felony offense of possession with intent to deliver cocaine, one of the "major controlled substance offenses." Based on the number of his prior felony convictions, the trial court sentenced the defendant as a fourth habitual offender pursuant to MCL 769.12. *People v Wyrick (Wyrick I),* 265 Mich App 483, 485 (2005).

After disposing of the defendant's appeal on grounds not relevant to the discussion here, the Court of Appeals then addressed an additional issue that had not been raised by either party—whether the trial court's sentence enhancement under the general habitual offender statutes was proper in light of the statutory directive for imposing sentence on a defendant whose subsequent conviction is for a "major controlled substance offense." *Wyrick I, supra* at 493. The Court of Appeals concluded that adherence to the plain language used in the general habitual offender statutes, and in MCL 769.12 specifically, required that the defendant's sentence, if enhanced, be enhanced pursuant to the provisions in the Public Health Code. Consequently, the Court remanded the case and instructed the trial court to amend the defendant's judgment of sentence to reflect that his sentence was enhanced pursuant to the Public Health Code's subsequent offender provision, and not pursuant to the habitual offender provision. *Wyrick I, supra* at 494.

In *Wyrick II*, the Michigan Supreme Court, by peremptory order, reversed the Court of Appeals. Relying on its decision in *People v Primer*, 444 Mich 269, 271–272 (1993), the Michigan Supreme Court's order vacated

> "the Court of Appeals decision to remand the case to the trial court to alter the reference in the judgment of conviction from enhancement under the Habitual Offender Statute, MCL 769.12,

to enhancement under the Public Health Code, MCL 333.7413(2). This change is unnecessary because the prosecutor may seek a greater sentence under the Habitual Offender Statute even when a defendant is sentenced under the Public Health Code." *Wyrick II, supra* at ___.

Part VI—Fashioning an Appropriate Sentence

8.28 Concurrent and Consecutive Sentences

Replace the first full paragraph on page 136 with the following text:

*Peremptory order vacating the Court of Appeals decision in *People v Wyrick*, 265 Mich App 483 (2005).

For purposes of the Code of Criminal Procedure, misdemeanors punishable by more than one year ("two-year misdemeanors") are felonies for purposes of consecutive sentencing. *People v Smith*, 423 Mich 427, 434 (1985). However, for purposes of the Public Health Code, offenses "expressly designated" as misdemeanors retain their character as misdemeanors without regard to the length of incarceration possible for conviction of the offense. *People v Wyrick*, ___ Mich ___ (2005) (misdemeanor possession of marijuana, second offense, does *not* constitute a felony for purposes of the consecutive sentencing provision in MCL 333.7401(3)).*

Part VII—Fines, Costs, Assessments, and Restitution

8.37 Restitution

Effective January 1, 2006, 2005 PA 184 amended MCL 780.766(2) to require a court to order restitution in conjunction with cases treated under the youthful trainee act, by a delayed sentence or deferred adjudication, or using another informal method. On page 168, insert the following sentence after the first sentence of the second paragraph:

Restitution is also mandatory "[f]or an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal." MCL 780.766(2).

Part VII—Fines, Costs, Assessments, and Restitution

8.38 Use of Bail Money to Pay Costs, Fines, Restitution, and Other Assessments

Effective January 1, 2006, 2005 PA 184 amended MCL 780.766a(1) to address allocation of payments in cases where a person must pay fines, costs, restitution, and other payments in more than one proceeding and fails to specify the proceeding to which a payment applies. Insert the following text before Section 8.39 near the bottom of page 171:

MCL 780.766a(1) governs the allocation of money collected from an offender who is obligated to make payments in more than one proceeding and who, when making a payment, fails to specify the proceeding to which the payment applies. MCL 780.766a(1) states in part:

> "If a person is subject to fines, costs, restitution, assessments, probation or parole supervision fees, or other payments in more than 1 proceeding in a court and if a person making a payment on the fines, costs, restitution, assessments, probation or parole supervision fees, or other payments does not indicate the proceeding for which the payment is made, the court shall first apply the money paid to a proceeding in which there is unpaid restitution to be allocated as provided in this section."

Part VIII—Specific Types of Sentences

8.40 Probation

Effective January 1, 2006, MCL 771.2a was amended to require that specific conditions be ordered for a defendant placed on probation under MCL 771.2a(5) after conviction of a "listed offense."* Insert the following text before the last paragraph on page 176:

*2005 PA 126.

Sex offenders and probation orders. Except for the non-probationable offenses in MCL 771.1 and as otherwise provided by law, a court may place an individual convicted of a "listed offense"* on probation for any term of years but not less than five years. MCL 771.2a(5). Additional conditions of probation must be ordered when an individual is placed on probation under MCL 771.2a(5). Subject to the provisions in MCL 771.2a(7)–(11), discussed below, the court must order an individual placed on probation under MCL 771.2a(5) **not** to do any of the following:

*"Listed offenses" are described in MCL 28.722 of the Sex Offenders Registration Act.

- reside within a student safety zone, MCL 771.2a(6)(a);
- work within a student safety zone, MCL 771.2a(6)(b); or
- loiter within a student safety zone, MCL 771.2a(6)(c).

A "student safety zone" is defined as the area that lies 1,000 feet or less from school property. MCL 771.2a(12)(f).

For purposes of MCL 771.2a, "school" and "school property" are defined in MCL 771.2a(12) as follows:

> "(d) 'School' means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12. School does not include a home school.
>
> "(e) 'School property' means a building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:
>
> > "(*i*) It is used to impart educational instruction.
> >
> > "(*ii*) It is for use by students not more than 19 years of age for sports or other recreational activities."

Individuals exempted from probation under MCL 771.2a(5). Even if a person was convicted of a "listed offense," MCL 771.2a(11) permits the court

to exempt that person from being placed on probation under subsection (5) if either of the following circumstances apply:

> "(a) The individual has successfully completed his or her probationary period under [the youthful trainee act] for committing a listed offense and has been discharged from youthful trainee status.
>
> "(b) The individual was convicted of committing or attempting to commit a violation solely described in [MCL 750.520e(1)(a)*], and at the time of the violation was 17 years of age or older but less than 21 years of age and is not more than 5 years older than the victim."

*Fourth-degree CSC where the individual is at least 5 years older than the victim and the victim is at least 13 years of age but less than 16 years of age.

Exceptions to the mandatory probation conditions concerning "school safety zones." Under the circumstances described below, the prohibitions found in MCL 771.2a(6)(a)–(c) do not apply to individuals convicted of a "listed offense."

Residing within a student safety zone. The court shall not prohibit an individual on probation after conviction of a "listed offense" from residing within a student safety zone, MCL 771.2a(6)(a), if any of the following apply:*

*MCL 771.2a(7)(a)–(c), effective January 1, 2006. 2005 PA 126.

> "(a) The individual is not more than 19 years of age and attends secondary school or postsecondary school, and resides with his or her parent or guardian. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends secondary or postsecondary school in conjunction with that school attendance.
>
> "(b) The individual is not more than 26 years of age, attends a special education program, and resides with his or her parent or guardian or in a group home or assisted living facility. However, an individual described in this subdivision shall be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends a special education program in conjunction with that attendance.
>
> "(c) The individual was residing within that student safety zone at the time the amendatory act that added this subdivision was enacted into law. However, if the individual was residing within the student safety zone at the time the amendatory act that added this subdivision was enacted into law, the court shall order the individual not to initiate or maintain contact with any minors within that student safety zone. This subdivision does not prohibit the court from allowing contact with any minors named in the

probation order for good cause shown and as specified in the probation order."

In addition to above exceptions, the prohibition against residing in a student safety zone, MCL 771.2a(6)(a), does not prohibit a person on probation after conviction of a "listed offense" from "being a patient in a hospital or hospice that is located within a student safety zone." MCL 771.2a(8). The hospital exception does not apply to a person who initiates or maintains contact with a minor in that student safety zone. *Id*.

Working within a student safety zone. If a person on probation under MCL 771.2a(5) was working within a student safety zone at the time the amendatory act adding these prohibitions was enacted into law, he or she cannot be prohibited from working in that student safety zone, MCL 771.2a(6)(b). MCL 771.2a(9). If a person was working within a student safety zone at the time of this amendatory act, "the court shall order the individual not to initiate or maintain contact with any minors in the course of his or her employment within that safety zone." *Id*. As with MCL 771.2a(7)(c), for good cause shown, a court is not prohibited by MCL 771.2a(9) from allowing the probationer contact with any minors named in the probation order and as specified in the probation order. MCL 771.2a(9).

If an individual on probation under MCL 771.2a(5) only intermittently or sporadically enters a student safety zone for work purposes, the court shall not impose the condition in MCL 771.2a(6)(b) that would prohibit the person from working in a student safety zone. MCL 771.2a(10). Even when a person intermittently or sporadically works within a student safety zone, he or she shall be ordered "not to initiate or maintain contact with any minors in the course of his or her employment within that safety zone." *Id*. For good cause shown and as specified in the probation order, the court may allow the person contact with any minors named in the order. *Id*.

Part VIII—Specific Types of Sentences

8.47 Special Alternative Incarceration (SAI) Units—"Boot Camp"

C. Placement in an SAI Program After a Sentence of Imprisonment

Effective January 1, 2006, 2005 PA 184 added to the felony article in the Crime Victim's Rights Act a notice provision specific to defendants considered by the Department of Corrections to be candidates for placement in an SAI unit. Insert the following text immediately before Part IX on page 197:

Notice to crime victims required. When requested in writing by a crime victim, the Crime Victim's Rights Act requires that notice of a defendant's prospective SAI placement be given to that victim. MCL 780.763a(3) states:

> "If the department of corrections determines that a defendant who was, in the defendant's judgment of sentence, not prohibited from being or permitted to be placed in the special alternative incarceration unit established under . . . MCL 798.13, meets the eligibility requirements of . . . MCL 791.234a, the department of corrections shall notify the victim, if the victim has submitted a written request for notification under [MCL 780.769], of the proposed placement of the defendant in the special alternative incarceration unit not later than 30 days before placement is intended to occur. In making the decision on whether or not to object to the placement of the defendant in a special alternative incarceration unit as required by . . . MCL 791.234a, the sentencing judge or the judge's successor shall review an impact statement submitted by the victim under [MCL 780.764]."

